Supreme Court, U.S.
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No. 97-855

In The

Supreme Court of the United States

October Term, 1997

In The Matter of the Estate of
ROBERT L. JOHNSON, Deceased

ROBERT M. HARRIS and ANNYE C. ANDERSON,

Petitioners,

vs.

CLAUD L. JOHNSON,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are the legatees of a person whom they say was the last surviving half-sibling of Robert L. Johnson, Deceased. Respondent, who was born out of wedlock, is the biological son of the decedent. Petitioners' statement that Respondent claimed his parentage for the first time at age sixty-one is incorrect.

1. Whether the unanimous decision of the Mississippi Supreme Court, which reversed the trial court's grant of Petitioners' Motion to Dismiss, denied Petitioners' right to due process of law under the Fourteenth Amendment, when the Court, following its previous decisions, found that principles of equity would waive the applicable statute of limitations?

2. Whether the unanimous decision of the Mississippi Supreme Court to use principles of equity to waive the applicable statute of limitations is in conflict with this Court's recognition of a state interest in the just and orderly disposition of decedents' estates, where, as here, there has been no distribution of estate assets, no adjudication of heirship and no disposition of the decedent's estate?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 10

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, ___ U.S. ___, 117 S.Ct. 1028 (1997) 11, 12

Lalli v. Lalli, 439 U.S. 259 (1978) 19

LeFlore by Primer v. Coleman, 521 So.2d 863 (Miss. 1988) 15

Matter of Estate of Flowers, 493 So.2d 950 (Miss. 1986) 15

Matter of Estate of Johnson, Harris, et al. v. Johnson, No. 92-CA-00883-SCT, 1996 WL 91128 1

Matter of Heirship of McLeod v. Price, 506 So.2d 289 (Miss. 1987) 18

Mills v. Habluetzel, 459 U.S. 91 (1982) 18

Rankin County Bank v. McKinion, 531 So.2d 822 (Miss. 1988) 8

Smith by and Through Young v. Estate of King, 501 So.2d 1120 (Miss. 1987) 15

Trimble v. Gordon, 430 U.S. 762 (1977) 16

AUTHORITIES

Mississippi Code Ann. § 91-1-15 (1972) 1, 8, 15, 16, 17, 19

Mississippi Code Ann. § 91-1-15 (1972) Preamble 17

Mississippi Code Ann. § 91-1-29 (1972) 2, 5, 15, 18

Rules of the Supreme Court of the United States, Rule 14 ..... 3, 10

31 Am.Jur.2d § 36 13

Warner's Griffith, *Mississippi Chancery Practice* (Rev. Ed.) §§ 32-47 ..... 13, 15

Griffith, *Mississippi Chancery Practice* § 47 13

OPINIONS BELOW

The Opinion of the Supreme Court of Mississippi was electronically published on August 21, 1997. 1996 WL 91128. When counsel for Respondent contacted the Mississippi Supreme Court Clerk's office they were told that the decision is intended for publication but the official citation to the Southern Reporter is not yet available.

JURISDICTION

Petitioners did not timely and properly raise a federal question and this Court does not have jurisdiction to review the judgment of the Supreme Court of Mississippi on a writ of certiorari.

STATUTES AND RULES INVOLVED

§ 91-1-15. Descent among illegitimates; definitions.*

The Preamble to Chapter 339, Laws, 1983
(Paragraph 4)

WHEREAS, it now appears that there is confusion as to the legislative intent in amending Section 91-1-15, Mississippi Code of 1972, and said section is now interpreted by some segments of the judiciary to mean that the Legislature did not intend to create a new, separate and distinct remedy for the benefit of all illegitimates without

*Petitioners have lodged the full text of § 91-1-15 with the Clerk and reproduced a portion of said statute, including a portion of the Preamble, in their Petition for Writ of Certiorari.

any classification and said amendment as now codified in Section 91-1-15, Mississippi Code of 1972, is interpreted by some segments of the judiciary to be prospective only rather than retrospective and prospective in effect and is interpreted not to have created a new, separate and distinct remedy for the claims of all illegitimates without classification;

§ 91-1-29. Heirs to be cited to appear.**

All the heirs at law and next of kin of said deceased who are not made parties complainant to the suit or petition, shall be cited to appear and answer the same. And in addition thereto a summons by publication shall be made addressed to "the heirs at law of _____, deceased," and shall be published as other publications to absent or unknown defendants, and the cause shall be proceeded with as other causes in chancery, and upon satisfactory evidence as to death of said person and as to the fact that the parties to said suit are his sole heirs at law, the court shall enter a decree that the persons so described be recognized as the heirs at law of such a decedent, and as such be placed in possession of his estate. And said decree shall be evidence in all the courts of law and equity in this state that the persons therein named are the sole heirs at law of the person therein described as their ancestor.

Miss. Code Ann. (1972).

**§ 91-1-29, as reproduced above, is the wording of the statute on the date of the opening of the estate.

Rules of the Supreme Court of the United States

Rule 14. Content of a Petition for a Writ of Certiorari

1. (g)(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

STATEMENT OF THE CASE

Petitioners are the legatees of Carrie Thompson, whom they claim was the half-sister of Robert L. Johnson, Deceased. Respondent Claud L. Johnson is the biological son of Robert L. Johnson, Deceased. Contrary to Petitioners' statements that they have shown Mrs. Thompson to be the decedent's half-sister and last surviving sibling, no such finding has been made by any court. Mrs. Thompson's relationship to the decedent, and Petitioners'

claimed right to inherit from this estate, have been contested and to date there has been no determination of heirship and no distribution of estate assets.

Respondent Claud L. Johnson was born out of wedlock to Virgie Jane Smith and Robert L. Johnson, Deceased, on December 16, 1931, in Lincoln County, Mississippi. (R. 218, Vol. I). During the latter years of his life Robert L. Johnson developed a notable reputation as a blues singer and guitarist, performing in Mississippi, Arkansas and Tennessee. Recognized today as one of the most influential bluesmen of all times, Robert L. Johnson died August 16, 1938, in Leflore County, Mississippi, at the age of 27. (R. 96, Vol. I). Respondent, his illegitimate son, was not yet seven years old when his father died. Although Robert L. Johnson left a legacy of forty-one recordings, consisting of twenty-nine of his own compositions and alternate versions of nearly half of those twenty-nine, he died a virtual pauper.

During the years following his untimely death, Robert L. Johnson's reputation increased. On **November 20, 1974**, Carrie Thompson, holding herself out as the decedent's half-sister, his last surviving sibling and his only heir, signed an agreement with Stephen LaVere, a music historian engaged in researching the life of Robert L. Johnson. Under this agreement Mrs. Thompson sold Mr. LaVere all of her purported right, title and interest in and to the musical works and recordings of Robert L. Johnson, as well as other documents, photographs, memorabilia and other material. The agreement provides for the heirs of Robert L. Johnson to receive one-half of all funds collected.

Until that time it was generally believed that the works of Robert L. Johnson were in the public domain and, as such, neither his heirs nor his estate were entitled to collect or were collecting royalties from the sale of his recordings. It was through Mr. LaVere's efforts that copyrights were obtained to the works of Robert L. Johnson and the estate was able to prosper. After entering into the agreement with Carrie Thompson, Mr. LaVere began to pursue, and was able to obtain, copyrights to the works of Robert L. Johnson.

On **June 1, 1989**, some fifty-one years after Robert L. Johnson's death, the initial petition to open his estate and the decree appointing Ms. Annye C. Anderson administratrix were filed in the Chancery Court of Leflore County, Mississippi, by Ms. Anderson. (R. 6-10, Vol. I). The Administratrix's Bond and Oath, filed by or on behalf of Ms. Anderson, was dated August 31, 1989. By placing her signature on that document, Ms. Anderson promised that she would "faithfully, truly and promptly perform and discharge all duties required of [her] by law" (R. 13, Vol. 1.). Among those duties is the requirement to summon the unknown heirs. Miss. Code Ann., § 91-1-29. When she testified in the Chancery Court of Leflore County on May 22, 1991, Ms. Anderson admitted that she made no effort to locate potential heirs of Robert L. Johnson (R. 79, Vol. III), while indicating her awareness that other potential heirs may exist. (R. 27, Vol. III). The required Notice to Creditors was not issued until **May 6, 1991**. The required Summons to Unknown Heirs was not published until **March 23, 1992**, by the successor administrator.

Annye C. Anderson, while not a blood relative of Robert L. Johnson, claims in the estate as a legatee under

the Last Will and Testament of Mrs. Thompson. The only known surviving potential blood-relatives of Robert L. Johnson are: (1) his son, Claud L. Johnson, Respondent herein; (2) Melvin Harris, grandson of Carrie H. Thompson and one of the petitioners herein; and (3) George Ball, Robert L. Johnson's cousin, who is a party to the Chancery Court heirship proceedings but is not a party to the proceedings in this court.

The First Inventory and Accounting made by Ms. Anderson was filed with the chancery court March 16, 1990. (R. 18-19, Vol. I). That inventory reported that the estate contained no property or money at that time and that the only assets were "miscellaneous and unknown." On May 3, 1991, the Second Inventory and Accounting was filed by Ms. Anderson, again reporting that the estate contained no property or money. (R. 60-61, Vol. I). However, Ms. Anderson still did not publish the statutorily-required notice to creditors and she did not summon the unknown heirs.

Finally, on May 6, 1991, almost two years after the opening of the estate, the first notice to creditors of the estate of Robert L. Johnson was published. (R. 114, Vol. I). Because the Chancellor (Judge) believed that a disinterested party should be in charge of the estate, on May 28, 1991, he appointed Willis B. Brumfield, then Chancery Clerk of Leflore County, successor administrator for the estate. (R. 112, Vol. I). (T. 990-92, Vol. III).

Subsequent to Mr. Brumfield's becoming successor administrator, the estate received the first payment of royalties on May 31, 1991. (R. 120-121, Vol. I). The First Accounting of Royalty Receipts and Expenses by Stephen

C. LaVere, and the Judgment approving the accounting, states that from November 21, 1974, the date of his agreement with Carrie Thompson, through February 20, 1983, the date of Carrie Thompson's death, "the total amount of $350.00 was paid directly to Carrie Thompson by Stephen C. LaVere in accordance with the terms of their agreement." (R. 122-123 and 135-136, Vol. 1.) Since the first payment of royalties, the estate has continued to receive royalty payments.

Respondent first appeared before the Chancery Court of Leflore County in response to a Petition to Determine Heirship, filed by the second administrator of the estate on February 6, 1992, and naming Claud L. Johnson as a potential heir and party defendant. (R. 175-178, Vol. I). Claud L. Johnson, by and through counsel, filed his formal entry of appearance February 19, 1992, (R. 204-205, Vol. I), and his answer to the Petition to Determine Heirship on March 10, 1992. (R. 213-219, Vol. I). On March 23, 1992, the statutorily required Summons to the Unknown Heirs at Law of Robert L. Johnson was first published, after the estate had been opened almost three years and after Claud L. Johnson had formally asserted his claim. (R. 259-262, Vol. II).

Ms. Anderson, one of the petitioners herein and the original administratrix, who failed to have the statutorily required notice to creditors issued for almost two years after she opened the estate and failed to have the statutorily required summons to unknown heirs published, and who stands to gain financially through her failure, filed a Motion to Dismiss (erroneously labeled a Motion for Summary Judgment by Petitioners in their brief) Claud L. Johnson's claim as time barred on April 30, 1992,

citing the three-year limitation period contained in § 91-1-15 of the Mississippi Code. (R. 269-272, Vol. II). At the conclusion of a June 22, 1992, hearing in the Chancery Court of Leflore County, Claud L. Johnson's claim was dismissed as time barred. Following the adverse ruling, Claud L. Johnson timely appealed to the Mississippi Supreme Court. (R. 463-464, Vol. II). Although the trial court denied Mr. Johnson's Motion to Stay the scheduled heirship proceeding, and it has proceeded, in part; to date there has been no determination of heirship and no distribution of estate assets.

Contrary to Petitioners' statement, this matter did not come "to the Mississippi Supreme Court on appeal from an Order for Summary Judgment by the Chancery Court." Petition for Writ of Certiorari, Page 11. While not germane to the matters before this Court, to avoid any misdirection Respondent must correct Petitioners' numerous misstatements regarding the matters before the Chancery Court, which brought the parties before the Supreme Court of Mississippi. Petitioners filed a Motion to Dismiss and Strike the Affirmative Allegations, not a Motion for Summary Judgment. A hearing was held on the Motion and an Order was entered, dismissing Respondent's claim as time barred. Petitioners have repeatedly attempted to convert this matter to a summary judgment proceeding, simply by changing its name, and that attempt must fail. Where resolution of the issue can be made without reference to matters outside the pleadings, for example, where an action can be dismissed because the applicable statute of limitations has expired, as was considered here, it is properly before the court and decided as a Motion to Dismiss. *Rankin County Bank v.*

McKinion, 531 So.2d 822 (Miss. 1988). The Chancellor did not convert the Motion to one for Summary Judgment and Petitioners cannot do so by simply changing words.

On March 28, 1996, the Supreme Court of Mississippi entered its unanimous decision, reversed the Chancery Court Order barring Respondent's claim and remanded the matter to the Chancery Court for further proceedings, holding that:

> . . . under these facts, equity will waive the statutory bar of Section 91-1-15 and open the window to the extent that [Respondent herein] shall be allowed to prosecute his claim to be the illegitimate son of Robert L. Johnson, deceased, to the same extent as though he had filed his claim between July 1, 1981, and July 1, 1984.

Mississippi Supreme Court Opinion, ¶ 36. In reaching its decision the Court applied several maxims of equity, including but not limited to, the doctrine of *executorship de son tort*.

Petitioners filed their Motion for Rehearing on April 12, 1996. That Motion was denied and the decision was electronically published on August 21, 1997. 1996 WL 91128. The decision is intended for publication but the official citation to the Southern Reporter is not yet available.

ARGUMENT

I. Because Petitioners did not timely and properly raise a federal question this Court lacks jurisdiction to review the decision on a writ of certiorari.

Rule 14(1)(g)(i) requires that the Petition for Writ of Certiorari contain:

> . . . specific references to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners have not met this requirement. Citing no authority and including no references to the record, Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257 and simply state that " . . . the decision- . . . deprived the Petitioners of their right to procedural due process under the Fourteenth Amendment." Petition for Writ of Certiorari, Pages 1 and 10.

More importantly, neither in their Brief before the Supreme Court of the State of Mississippi, filed July 12, 1993, nor in their Petition for Rehearing, was a federal question timely and properly raised by Petitioners.

Petitioners' Brief in response to Respondent's appeal to the Mississippi Supreme Court does not contain any allegation of a denial of any of Petitioners' constitutional rights. The Petition for Rehearing alleged three reasons to grant rehearing and asked the Mississippi Supreme Court to rehear the appeal because:

> First, the Court has overlooked and has misperceived essential facts that underpin its decision; Second, the Court has applied a doctrine in

> reaching its decision which is not supported by the facts or law of record, and Third, the Court has turned its back on its own decisions and the laws of this State as they limit the tolling of periods of limitation.

Petition for Rehearing by Robert M. Harris & Annye C. Anderson; In the Supreme Court of the State of Mississippi, Cause No. 92-CA-0883, dated April 11, 1996.

As this Court reiterated in its most recent opinion dealing with this issue:

> With 'very rare exceptions,' *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. *See, Heath v. Alabama*, 474 U.S. 82, 87, 106 S.Ct. 433, 436-437, 88 L.Ed.2d 387 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219, 103 S.Ct. 2317, 2321-2322, 76 L.Ed.2d 527 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940).

Adams v. Robertson, ___ U.S. ___, 117 S.Ct. 1028, 1029 (1997).

Similar to the posture of the present Petition for Writ of Certiorari, the *Adams* Petitioners raised their alleged due process claim in their petition for rehearing. As this Court noted:

> [W]e have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the

> question, *see Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-550, 107 S.Ct. 1940, 1947-1948, 95 L.Ed.2d 474 (1987); *Hanson v. Denckla*, 357 U.S. 235, 244, n.4, 78 S.Ct. 1228, 1234, n.4, 2 L.Ed.2d 1283 (1958); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 569 (1945).

Adams, at 1031.

Buried within the Petition for Rehearing, and citing no authority, Petitioners make the general statement that application of the doctrine of *executor de son tort* denies them of their right to due process of law. Notably, not one of Petitioners' arguments is the denial of due process or is premised on the denial of due process and the Mississippi Supreme Court opinion is silent on the purported federal question which Petitioners allege is now before the Court. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented[.]" *Adams*, at 1029, *citations omitted.*

II. Petitioners were not denied their right to due process of law under the Fourteenth Amendment when the Supreme Court of Mississippi followed its previous decisions and held that principles of equity would waive the applicable statute of limitations.

Even if this petition is properly before the Court, the decision of the Supreme Court of Mississippi did not deny Petitioners their right to due process of law and was not, as Petitioners argue, based solely on the equitable doctrine of which they now complain. In support of their argument Petitioners rely on and quote from Justice Banks's dissent, which is a dissent to the denial of the Petition for Rehearing, not a dissent from the opinion or the result.

The parties are before this Court on a Petition for Writ of Certiorari, which asks this Court to review the judgment of the Supreme Court of Mississippi, a unanimous decision. Moreover, the record clearly supports the Mississippi Supreme Court's reliance on equitable principles, including the doctrine of *executorship de son tort*, to waive the applicable statute of limitations, and their reliance is not premature.

The doctrine of *executorship de son tort* means "any intermeddling with the estate of a decedent under a claim of authority[.]" 31 Am.Jur.2d ***Executor and Administrators***, § 36. The effect of this doctrine, and all other maxims of equity, is to prohibit a wrongdoer from benefitting from his own wrong. Warner's Griffith, *Mississippi Chancery Practice* (Rev. Ed.) §§ 32-47.

> No person bound to act for another can act for himself. This is a principle as old as the first among laws, and it has an especially wide application in the processes and proceedings in chancery as a court of conscience.

Griffith, *Mississippi Chancery Practice*, § 47.

From at least November 21, 1974, the date of the written agreement between Stephen C. LaVere and Carrie Thompson, who claimed to be the half-sister of Robert L. Johnson, deceased, Mrs. Thompson held herself out as the only living heir of the decedent. With the signing of this agreement Mrs. Thompson began to act as an *executrix de son tort* of the unprobated estate of Robert L. Johnson, deceased, which, at that time had no value.

The Mississippi Supreme Court found that Petitioner Annye Anderson "assumed the status of an *executrix de*

son tort" when she obtained the power of attorney from Mrs. Thompson and began acting for her in 1981. Mississippi Supreme Court Opinion, ¶ 32. In fact, at the May 22, 1991, hearing, Ms. Anderson testified that she had contacted various companies regarding estate assets in the early 1980s, prior to the opening of the estate and her appointment as administratrix. (R. 34, Vol. 3.) In discussing the 1981 power of attorney she received from her half-sister, Carrie Thompson, Ms. Anderson stated that she received it because she "was dealing with the Robert Johnson estate with my sister . . . [and] had been dealing with the estate . . . for quite some time." (R. 45-46, Vol. 3.)

Petitioners allege that the Mississippi Supreme Court improperly relied on the above testimony. However, on Page 9 of their brief to the Mississippi Supreme Court Petitioners acknowledge the actions of Mrs. Thompson and Ms. Anderson, described in the above-quoted testimony, and state as follows:

> Most striking about the circumstances of this case is that the heirs of Robert L. Johnson have, since the late 1970s, been working to regain control and obtain compensation from the works and estate of Robert Johnson.

In the Supreme Court of the State of Mississippi, Cause No. 92-CA-0883; Brief of Appellees Robert M. Harris & Annye C. Anderson, July 12, 1993.

Contrary to Petitioners' contention, the Mississippi Supreme Court did not presume malign intent on the part of Ms. Anderson. Rather, the Court simply recognized and gave a name to the actions taken by Mrs. Thompson and Ms. Anderson between 1974 and 1989. Clearly, Mrs.

Thompson, and subsequently, Ms. Anderson, performed the functions of administratrix, without authority from any court, until 1989, when Ms. Anderson opened the estate and took the Administrator's oath. Unfortunately, upon receiving the authority to act as administratrix Ms. Anderson did not act in conformity with the duties of that office.

Most importantly, in her position as administratrix Ms. Anderson held a fiduciary relationship to the decedent's creditors and heirs and as such she had, at the very least, an affirmative duty to summon the unknown heirs of the estate, which she did not do. *Miss. Code Ann.* § 91-1-29. With this fiduciary relationship comes the presumption that acts of the administratrix are for the benefit of, not contrary to, the interests of other heirs. Warner's Griffith, *Mississippi Chancery Practice* (Rev. Ed.), § 47.

Petitioners were not denied their due process rights when the Mississippi Supreme Court followed its previous decisions and held that Mrs. Thompson and Ms. Anderson were under a duty to act for the estate, not themselves, and allowed principles of equity to waive the statutory bar. The Supreme Court of Mississippi has repeatedly held that mandatory compliance with the provisions of § 91-1-15(3)(c) by an illegitimate presupposes the good faith compliance by the administratrix/administrator with the obligation imposed by law to summon the heirs. See, *LeFlore by Primer v. Coleman,* 521 So.2d 863 (Miss. 1988); *Smith by and Through Young v. Estate of King,* 501 So.2d 1120 (Miss. 1987); *Matter of Estate of Flowers,* 493 So.2d 950 (Miss. 1986).

As the Supreme Court of Mississippi stated:

> Our Mississippi courts have long followed the maxim of equity that no person bound to act for another can act for herself. From 1974, until the Chancellor removed Ms. Anderson as administratrix in 1991, Mrs. Thompson and Ms. Anderson were under a duty to act for the rightful heirs of Robert L. Johnson, not for themselves.

Opinion of the Supreme Court of Mississippi, ¶ 36.

III. The unanimous decision of the Mississippi Supreme Court, holding that principles of equity would waive the applicable statute of limitations, is not in conflict with the recognized state interest in the just and orderly disposition of decedent's estates.

At issue in the court below was the right of an illegitimate child to inherit from his intestate biological father. Articulating that this is a matter particularly within the competence of the individual States, this Court recognized the State's primary responsibility in this area and stated that "[a]bsent an infringement of a constitutional right, the federal courts have no role [in the distribution of estates][.]" *Trimble v. Gordon*, 430 U.S. 762, 771 (1977).

Following the *Trimble* decision Mississippi's law concerning the right of an illegitimate child to inherit from its father underwent drastic change. During its 1981 Regular Session the Mississippi Legislature passed an act amending § 91-1-15 of the Mississippi Code of 1972.

This amendment, intended to remove the insurmountable barrier to inheritance by illegitimate children when compared to the rights enjoyed by legitimate children, and to provide for intestate succession between an illegitimate child and its father, contained an additional remedy in favor of all illegitimate children *having a claim existing prior to the adoption of the amendment on July 1, 1981 and concerning the estate of an intestate whose death occurred prior to such date.* Recognizing the possibility of opening the door to stale or fraudulent claims and creating uncertainty as to the status of title to real property, the legislature provided a three-year window of opportunity for those who previously had been denied their right of inheritance.

Petitioners do not accurately describe the legislative intent behind the adoption of the Preamble to § 91-1-15. Contrary to Petitioners' statement, it is clear from a reading of the entire Preamble adopted by the Mississippi Legislature and added to § 91-1-15, that the Preamble was intended to clarify the legislative intent, not to explain the legislature's awareness of the possible litigation of stale claims.

When Robert L. Johnson died in 1938 his estate had no tangible assets or value. More than fifty years after the musician/composer's death, and five years after the three-year window of opportunity found in § 91-1-15 had closed, a fortunate change of circumstances, of which Respondent had no knowledge and could have had no knowledge, occurred, which allowed the estate to have monetary value and Robert L. Johnson's estate was opened.

Under these unique facts Respondent lacked both knowledge and notice of the existence of an estate against which he could assert a claim. *Matter of Heirship of McLeod v. Price*, 506 So.2d 289 (Miss. 1987). Respondent never had a reasonable opportunity to assert his claim and could not effectively utilize the opportunity the Mississippi legislature intended to provide for him. *Mills v. Habluetzel*, 459 U.S. 91 (1982).

The first publication summoning unknown heirs, required by § 91-1-29, occurred March 23, 1992, in six newspapers within a three-state area (Mississippi, Arkansas, and Tennessee). Following a strict construction of the language of § 91-1-15, anyone who answered the summons would be allowed to participate in the heirship proceeding, *except illegitimate children*, an unconscionable result and one which has occurred in this case. On June 5, 1992, George Ball, one of the decedent's cousins, filed a Motion for Leave to File Claim Out of Time. That motion was granted on June 29, 1992, and Mr. Ball has been allowed to participate in the heirship proceedings.

If Claud L. Johnson were the legitimate son of Robert L. Johnson he would have been allowed to participate in the heirship proceeding without any complaint of a stale claim. If all the facts and circumstances were the same but we were dealing with the estate of Claud L. Johnson's mother, he would have been allowed to participate in the heirship proceeding without any complaint of a stale claim. It is only because his parents were not married to each other on the date of his birth that Petitioners can put forth the argument that Respondent is time-barred from participating in the heirship proceeding.

The legitimate state interest in the just and orderly disposition of estates, which includes assuring the certainty of titles, the prompt determination of the rights of descent and distribution, and the speedy and proper closing of estates, will not be defeated by Respondent's participation in the heirship proceeding. This Court has recognized the substantial state interest in providing for the just and orderly disposition of property at death. *Lalli v. Lalli*, 439 U.S. 259 (1978). In the case of Mr. Johnson's estate, there was no property at death and there was nothing of value. Now the estate has acquired considerable value. However, there has been no determination of heirship by any court and no distribution of estate assets has occurred. Under these circumstances, denying Respondent the opportunity to participate in the heirship proceeding is not justified by the state interest in the just and orderly disposition of estates.

Petitioners argument that elemental fairness is violated by expecting them to defend against a claim and gather reliable evidence of what took place in 1931 must fail. That argument ignores the basic fact that the burden of proof, which in this instance is **to prove paternity by clear and convincing evidence**, is on Respondent. § 91-1-15, Miss. Code Ann. (1972). Respondent is the one who must gather reliable evidence of what took place in 1931. Respondent is the one who must overcome the difficulties to which Petitioners make reference.

Moreover, all parties to the heirship proceeding, to one degree or another, are faced with the same difficulty: having to prove/disprove what took place many, many years ago. Respondent must prove his parentage and

what took place in 1931. Petitioners must prove the lineage of Mrs. Thompson by proving what took place in 1903, the year their legatee, Mrs. Thompson, was born. Difficulties of proof may be or have been encountered during the presentation of Petitioners' proof *and* Respondent's proof. It cannot be said that allowing Respondent to participate in the heirship proceeding offends the state interest in discouraging the litigation of stale claims but that allowing Petitioners to participate does not.

The estate has been opened for more than eight years. There has been no determination of heirship by the trial court and no estate assets have been distributed. Under these circumstances, it cannot be said that allowing Respondent to participate in the heirship proceeding offends the state interest in the just and orderly disposition of estates.

CONCLUSION

The petition exalts form over substance. The asserted errors consist of nothing more than alleged erroneous factual findings or the misapplication of a properly stated rule of law. The decision below was a plainly correct application of settled law, there is no split among the circuits, no federal question is involved and none was timely and properly raised. Petitioners' fact-bound claim does not warrant review by this Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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